

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

-----  
IN RE:

HAROLD R. SHERRELL  
PATRICIA A. SHERRELL  
d/b/a Apple Tree  
A-Cat-A-Me Child Care  
Center,

CASE NO. 89-00255

Debtors

-----  
HAROLD R. SHERRELL and  
PATRICIA A. SHERRELL,

Plaintiffs

vs.

ADV. PRO. NO. 93-70031

FLEET BANK OF NEW YORK, NORSTAR  
BANK OF NEW YORK and CITIBANK  
OF NEW YORK STATE,

Defendants

-----  
APPEARANCES:

HAROLD R. SHERRELL  
Debtor Pro se  
55 Bayberry Circle  
Liverpool, New York 13090

COSTELLO, COONEY & FEARON, ESQS.  
Attorneys for Fleet Bank  
of New York  
(Day Care Center Mortgage Holder)  
205 South Salina Street  
Syracuse, New York 13202

MICHAEL RELIGA, ESQ.  
Of Counsel

KALL & REILLY, ESQS.  
Attorneys for Fleet Bank  
of New York  
(Home Mortgage Holder)  
3522 James Street  
Syracuse, New York 13206

RICHARD REILLY, ESQ.  
Of Counsel

STEPHEN D. GERLING, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the motion of Harold R. Sherrell and Patricia A. Sherrell, individually and d/b/a Apple Tree A-Cat-A-Me Day Care Center ("Debtors") seeking leave to amend their complaint which commenced the within adversary proceeding.

The motion was heard at a motion term of this Court held at Syracuse, New York on March 15, 1994 and was submitted for decision on that date.

The motion was opposed by one of the Defendants, Fleet Bank of New York, (formerly known as Norstar Bank) ("Fleet").

JURISDICTIONAL STATEMENT

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§1334(b), 157(a), (b)(1) and (b)(2)(E) and (O).

FACTS

The Debtors filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") on February 15, 1989. Debtors owned two parcels of real property known as 55 Bayberry Circle, Liverpool, New York, Debtors' residence ("Residence"), and 7211 Oswego Road, Liverpool, New York, utilized by Debtors as a day care center ("Day Care Center"). The Residence was encumbered by a mortgage held by Fleet and the Day

Care Center was likewise encumbered by two mortgages held by Fleet.

In the course of Debtors' Chapter 11 case, Fleet moved successfully to lift the stay imposed pursuant to Code §362(a) with regard to the Residence and proceeded with the foreclosure of its mortgage in state court. On February 17, 1993, the Residence was sold at a foreclosure sale for the sum of \$54,500.

On March 1, 1993, the Debtors, through their then attorney Ralph A. Mingolelli, Esq. ("Mingolelli"), commenced this adversary proceeding by filing a complaint alleging essentially three causes of action. The first and second causes of action asserted that the Fleet foreclosure sale constituted a fraudulent transfer, while the third cause of action appears to allege that the foreclosure sale was conducted in violation of a temporary restraining Order issued by this Court on February 17, 1993. The "Wherefore" clause in Debtors' complaint sought to set aside and invalidate the foreclosure sale. Debtors' complaint also named as defendants Citibank, the holder of a junior mortgage on the Residence, and the referee appointed by the state court to conduct the foreclosure sale.<sup>1</sup>

While the adversary proceeding was pending, Debtors' Chapter 11 case was converted to one pursuant to Chapter 7 on June 18, 1993. However, no effort was made to add the Chapter 7 Trustee as a party plaintiff in the adversary proceeding; nor has the Chapter 7 Trustee moved to intervene herein. Additionally, while

---

<sup>1</sup> The adversary proceeding was later dismissed as against the referee by Order dated May 19, 1993 and the SBA, though unnamed as a defendant, interposed an answer to the complaint alleging themselves to be a third mortgagee on the Residence.

the adversary proceeding was pending, the purchasers at the February, 1993 state court foreclosure sale, with the consent of Fleet and the referee, rescinded their purchase offer and their deposit was returned to them.

As a result of the rescinded foreclosure sale, Fleet's attorney then sought to obtain from the Debtors a voluntary stipulation of discontinuance of the adversary proceeding. However, by Order dated December 23, 1993, Mingoelli was discharged as Debtors' attorney and Debtors, acting pro se, would not execute the stipulation.

The adversary proceeding was thereafter scheduled for trial on January 12, 1994. However, on that date, the Court further adjourned the trial to its motion calendar in Syracuse on February 8, 1994. On February 10, 1994, the Court entered an Order conditionally dismissing the adversary proceeding unless the Debtors filed a motion to amend the complaint on or before February 25, 1994.

Debtors filed the instant motion on February 17, 1994, seeking to amend the complaint and for an order restraining and enjoining Fleet from "any and all foreclosure sales." As indicated, the motion was argued before the Court on March 15, 1994.

Debtors, who now proceed pro se, apparently seek to add Fleet's counsel, Kall & Reilly, Esqs. ("K&R"), as additional defendants in the adversary proceeding, alleging that K&R made unauthorized deductions from Debtors' monthly mortgage payments to Fleet, thereby causing a default under the Fleet mortgage, and then proceeded to institute a foreclosure action on the mortgage to

"hide their deeds". Debtors also allege now that Fleet's sale of its mortgage during the pendency of the Chapter 11 proceeding to a third party was an illegal transfer.

Finally, Debtors seek to add a cause of action asserting that Fleet violated the federal truth in lending laws in issuing a mortgage commitment letter in April 1982, regarding the day care center property.

Fleet, through its attorneys, makes several arguments in opposition.<sup>2</sup> Initially, Fleet contends that the Debtors have no standing to maintain the adversary proceeding since their case has been converted to Chapter 7 and thus, the causes of action they seek to assert by way of amendment belong to the Chapter 7 Trustee. Next, Fleet argues that federal truth in lending laws have no application to a commercial transaction, that even if they did, any action is now barred by a one year statute of limitations and that Debtors are guilty of laches in that they entered into stipulations of adequate protection with Fleet regarding the Day Care Center property and never raised any of the claims now being asserted.

Fleet further points out that the Debtors have failed to attach a proposed amended complaint to their papers, that allegations regarding the Day Care Center mortgage were not a part of the original complaint, that Debtors knew about the allegations they now seek to assert in an amended complaint long before the adversary proceeding was commenced and offer no reason why they

---

<sup>2</sup> Fleet opposes the motion by two different counsel. K&R has interposed answering papers with regard to the Residence mortgage, while Costello, Cooney & Fearon, Esqs., have answered the motion as Fleet's attorneys in connection with the Day Care Center mortgage.

weren't pled initially or why Debtors have waited so long to seek an amendment.

Finally Fleet acknowledges that it has sold the Residence mortgage to a third party, EMC Mortgage Corporation ("EMC"), and EMC will be prejudiced by an amended complaint. Fleet points out that a mortgage foreclosure action is still pending in state court and Debtors' current allegations can be addressed there.

#### DISCUSSION

The first issue presented to the Court by Debtors' motion is one of standing. Fleet asserts that the causes of action that Debtors seek to assert by way of amendment of the complaint constitute property of the estate pursuant to Code §541 and thus, the only party that has standing to seek amendment of the complaint is the Chapter 7 Trustee. If Fleet's contention is correct, this Court need not reach the merits of this contested matter.

While Fleet's standing argument may be accurate to a point, the law is well-settled that where a claim belongs to the bankruptcy estate, but is effectively abandoned by the trustee, it becomes the debtor's property and may be pursued by the debtor for his or her personal benefit.

In the matter sub judice, there is no indication that the Chapter 7 Trustee has assumed any role or taken any action. Conversely, there is no docket entry whereby the Chapter 7 Trustee has abandoned any of these causes of action pursuant to Code §554(a); nor, in fact, does a review of Debtors' petition and

schedules initially filed on February 15, 1989, reveal that Debtors claimed them as assets and as exempt property pursuant to the applicable provisions of the New York Debtor and Creditor Law.

Abandonment cannot be assumed from the Chapter 7 Trustee's inaction, particularly where the assets allegedly abandoned were not listed in the petition and schedules, as appears to be the case here. As the Bankruptcy Appellate Panel for the 9th Circuit observed in In re Pace, 146 B.R. 562, 564 (9th Cir. BAP 1992), "Abandonment pursuant to §554(a) or (b) according to Federal Rule of Bankruptcy Procedure 6007, requires notice, a hearing, and an order of the Court authorizing the abandonment." (citations omitted). The 9th Circuit BAP went on to observe that property abandoned pursuant to Code §554(c) presumes that the property has been properly scheduled in a debtor's petition.

Unquestionably, had Debtors' case remained a Chapter 11 throughout the course of this adversary proceeding, the Chapter 7 Trustee would have no rights, but upon conversion, all of the Debtors' alleged claims against Fleet became property of the estate to be administered by the Chapter 7 Trustee until successfully claimed as exempt or abandoned. See In re Leird Church Furniture Mfg. Co., 61 B.R. 444, 446 (Bankr. E.D.Ark. 1986).

This Court hesitates, in the absence of the Chapter 7 Trustee as a party plaintiff, to consider the merits of the motion to amend pursuant to Federal Rule of Bankruptcy Procedure 7015 and Federal Rule of Civil Procedure 15. Conversely the Court does not believe that the absence of the Chapter 7 Trustee at this juncture should be dispositive of the motion on the merits.

Therefore, based upon the foregoing, it is

ORDERED that Debtors' motion to amend their complaint is denied, without prejudice, and it is further

ORDERED that Debtors shall immediately serve a copy of this Order on the Chapter 7 Trustee, Mary Leonard, Esq. and file an affidavit of service with the Clerk of this Court, and it is further

ORDERED that the Chapter 7 Trustee, Mary Leonard, Esq., shall, within thirty (30) days of the date of service of a copy of this Order, file and serve a motion pursuant to Federal Rule of Bankruptcy Procedure 7024 to intervene in the within adversary proceeding as plaintiff, or in the alternative, within said thirty day period, file and serve a motion pursuant to Federal Rule of Bankruptcy Procedure 6007 to abandon the causes of action set forth in the complaint, as well as those sought to be added herein by way of amendment.

Dated at Utica, New York

this        day of July, 1994

---

STEPHEN D. GERLING  
U.S. Bankruptcy Judge